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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-438

SAMUEL FIELDS (Admitted as SAMUEL FELDSTEIN),
an Attorney,

Petitioner,

—v.—

THE ASSOCIATION OF THE BAR OF THE
CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

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Preliminary Statement

This is a petition for a writ of certiorari to review orders of the Court of Appeals of the State of New York, entered on July 7, 1971, denying petitioner's motion for leave to appeal and granting respondent's motion to dismiss an appeal taken as of right from orders of the Appellate Division, First Department (hereinafter referred to as "the Appellate Division"), made and entered on April 20, 1971, and June 3, 1971, disbarring petitioner and denying his motion for leave to reargue, respectively.

Statement of the Case

Although a statement of the case is contained in the petition, respondent finds it necessary, in accordance with Rule 40 (3) of the Revised Rules of this Court, to submit a supplemental statement setting forth additional facts which, in respondent's view, are essential to a determination of the petition.

The petition seeks to leave the impression that petitioner was disbarred on the basis of a record devoid of any affirmative evidence of the misconduct charged. This claim can only be described as a gross misrepresentation of the proceeding and requires respondent to demonstrate the overwhelming evidence adduced.

On August 23, 1962, the complainant's husband died as a result of injuries sustained in an accident, leaving the complainant widowed at the age of 19 with two infant children (Min. pp. 2-4). The complainant, thereafter, retained petitioner (Min. pp. 4-5) to prosecute claims arising out of the accident against her deceased husband's employer ("Protective") and the owner of the shipyard at which the accident took place ("Hitchcock").

In January 1963, petitioner settled the claim against Protective for $27,400 (Pet. Ex. 4),* the clients' share of that recovery to be divided among the complainant individually and among each of her two infant children. In February 1963, the complainant's personal share of this settlement, amounting to $5,577.78, was by agreement (Pet. Ex. 6A) entrusted to petitioner to be disbursed in accordance with instructions received from the complainant and

* Respondent here was petitioner below and vice versa.

her father. Petitioner converted at least $3,800 of this sum to his own use without authority. One allegation of the charge which resulted in petitioner's disbarment was predicated upon this admitted use of client funds without authority.

Petitioner continued to represent the complainant and her two infant children in their claim against Hitchcock. He ultimately instituted suit in the Federal Court in Connecticut. Petitioner settled this claim in the summer of 1965 for $4,800. Out of the net proceeds thereof the complainant was to receive $906.06 and each of her two infant children was to receive $906.07. The circumstances surrounding this settlement and the disposition of the proceeds were the subject of the remaining allegations of the charge resulting in petitioner's disbarment.

It was charged, in substance, that petitioner had entered upon the settlement without the complainant's knowledge or consent, had signed her name without authority to the petition seeking approval of the settlement by the Surrogate's Court (necessitated by the fact that complainant was prosecuting the claim as the representative of her husband's estate), had endorsed the complainant's signature on the three checks in payment of the net proceeds (one to the complainant personally and the other two to the complainant as guardian of each of her children) and had converted the proceeds of these checks, amounting to approximately $2,700, to his own use without authority. The use of the settlement proceeds without authority was admitted. The allegations involving unauthorized settlement of the claim were denied.

Petitioner was never charged with the commission of a crime. He was charged with professional misconduct on

the basis of the conduct alleged. It is true that his conduct might also justify criminal charges but that fact no more transforms a disciplinary proceeding into a criminal prosecution than does the underlying larcency in a civil suit for recovery of the proceeds converted.

We now turn to a discussion of the evidence adduced by respondent in support of the contested portion of the charge and relied upon by the Referee in response to petitioner's claim that no such evidence was adduced:

(1) Referee's Report, page 25: During the course of his negotiations with the attorney for the defendant Hitchcock which led to the settlement of the claim, petitioner requested that the settlement be paid without obtaining approval of the Surrogate's Court (Min. pp. 328-9). This request itself was improper in that the complainant was bringing the action pursuant to limited letters of administration issued by the Court and its approval of any settlement was needed. Had this improper request been agreed to by the attorney for the defendant, it would have obviated the necessity for preparing a petition seeking Court approval to which, it was charged, petitioner signed the complainant's name without authority.

Petitioner at first denied ever having requested that the settlement be paid without obtaining approval of the Surrogate's Court (Min. pp. 498-498A) and altered his testimony only after respondent, in the course of a preliminary hearing, produced the attorney for the defendant who testified that such a request had indeed been made but rejected (Min. pp. 334, 498A-9).

(2) Referee's Report, page 17: Petitioner thereafter prepared a petition seeking approval of the settlement by the

Surrogate's Court (Pet. Ex. 12). This petition bears the complainant's signature in five places. On some of the same pages, respondent's signature appears also. In addition, respondent's signature appears by itself. Although the petition is a ribbon original, each of these signatures is a carbon impression. Both petitioner and respondent produced handwriting experts who disagreed as to the genuineness of the complainant's signature appearing therein. The Referee refused to rely on either expert. He instead concluded, on the basis of photographic enlargements containing, in juxtaposition, reproductions of the disputed as well as concededly genuine signature of the complainant (Pet. Ex. 16), that the disputed ones were not written by the person who wrote the authentic ones.

(3) Referee's Report, page 18: Petitioner contended before the Referee that he had mailed the petition seeking approval of the settlement (Pet. Ex. 12) to the complainant for execution and that she had returned it in the condition in which he filed it with the Surrogate's Court. Yet, each of the complainant's signatures appearing therein was accompanied by a certification by petitioner that the signature had been personally signed in his presence.

(4) Referee's Report, pages 23-4: The petition (Pet. Ex. 12) contains a number of statements which the complainant would have known were untrue, had the petition ever actually been submitted to her, including the representation that petitioner had not been given any funds to defray the expenses of the claim against Hitchcock although, in fact, he had received $1,000 of the Protective settlement for that very purpose (Min. pp. 34-5, 472-3).

(5) Referee's Report, pages 15-16, 19: There is in existence no covering letter from petitioner to complainant forwarding the petition for execution (Min. p. 662). Other documents in evidence reveal that when petitioner concededly sent documents to the complainant for execution he would indicate by the initials "R.C." where she was to sign and did so even when the complainant's name was typed beneath the signature bar (Pet. Ex. 26). No such notation appears on the petition.

(6) Referee's Report, page 16: Petitioner testified before the Referee (Min. p. 696) that he had discovered the unusual circumstance that all signatures on the ribbon original of the petition were signed through carbon paper in 1965 upon allegedly receiving the executed petition through the mail from the complainant in that condition. Yet, at an interview with respondent's counsel in 1969 during the investigation prior to the formal proceeding, petitioner testified that he had not discovered the existence of the carbon signatures until 1969 when he was advised of the allegations of the complaint (Min. pp. 696-702). This interview was transcribed and a copy thereof was forwarded to petitioner who subsequently made written corrections but in no way altered his testimony in this regard.

(7) Referee's Report, pages 20-25: Petitioner prepared an order for the Surrogate's Court approving the Hitchcock settlement (Pet. Ex. 23) which differed materially from the order he had prepared authorizing the earlier Protective settlement (Pet. Ex. 22). The earlier order had properly provided that the checks payable to the complainant as guardian of her children for their share of the settlement be made payable jointly to the complainant and to

the Clerk of the Surrogate's Court. The order which petitioner prepared for approval of the Hitchcock settlement provided that the checks in payment of the childrens' share be made payable to the complainant alone.

When the latter order was submitted to the Surrogate's Court, it was entered (Pet. Ex. 23) with handwritten corrections requiring that the checks in payment of the childrens' share be made payable jointly to the complainant and the Clerk of the Surrogate's Court and further providing that the defendant would be released not "upon making the payments aforesaid" as the order prepared by petitioner provided but only after "filing receipts therefor" as well as per the handwritten insertion by the Court.

Upon entry of the order with the corrections noted, petitioner conformed every change, regardless of how minor it was, except those changes pertaining to the manner of making payment of the childrens' shares and the necessity for the defendant to file receipts for such payments. These were omitted. Petitioner then certified each page of a copy of the order incorrectly conformed as indicated as true and correct (Pet. Ex. 21) and then forwarded it to the attorneys for the defendant with a letter (Pet. Ex. 29) requesting prompt payment so that "my clients may have the use of the checks for the Christmas season," which was then some four weeks away. Petitioner, however, conceded that his client had not asked for any portion of the proceeds or any other monies in his possession (Min. pp. 702-4) and, in fact, upon receipt of the settlement checks, admittedly invaded the proceeds to his own use and forwarded not one cent to the clients.

(8) Referee's Report, pages 6-9: Upon receipt of the settlement proceeds in the form of three checks (Pet. Exs. 13-31 & 32) payable to the complainant, one to her individually and two to her as guardian of each of her children, petitioner admittedly endorsed her signature, without authorization (Min. p. 439), and deposited them one at a time in his account and converted the proceeds (Min. pp. 748-52). The first of these checks deposited by petitioner in his account (Pet. Ex. 13) bears the complainant's purported signature written through carbon paper in a handwriting different from petitioner's own and evidences the use of different pens for the various endorsements thereon.

(9) Referee's Report, page 19: In December 1966, a conference took place in petitioner's office at complainant's insistence at which she claimed she did not know the status of the Hitchcock claim and to which she brought another attorney whom she consulted for the purpose of representing her in determining the status of the matter (Min. p. 771ff). In the course of that conference, petitioner disclosed the Hitchcock settlement and claimed that the complainant had authorized it, a claim which the complainant denied. The attorney brought to this conference by the complainant testified that petitioner at that time (contrary to his later testimony before the Referee) claimed that the petition bearing the complainant's questioned signature had been executed by her personally in petitioner's presence (Min. p. 773).

(10) Referee's Report, pages 10-11: At the conclusion of the December 1966 conference petitioner paid the complainant all monies then due her and her children less some $850 which petitioner continued to hold to pay pos-

sible claims by the doctors and hospital predicated upon treatment rendered to the complainant's husband prior to his death (Min. pp. 84-7). Although petitioner claimed that he opened a special account to segregate client funds following the December 1966 conference, and that complainant had falsely accused him of settling the Hitchcock claim without her knowledge and consent at that conference, he thereafter invaded the money still in his possession to his own use without authority (Min. pp. 729-41).

(11) Referee's Report, page 28: In August 1968, when the statute of limitations expired with respect to any claim predicated upon the treatment of complainant's husband prior to his death, petitioner still had in his possession $502.25 to pay any possible claim by the hospital. He offered to turn over these monies, which were the complainant's property, only upon her executing a general release absolving petitioner of all liability (Pet. Exs. 14 & 26). This refusal to turn over trust funds without a general release for which no consideration was offered was the final element of the charge sustained by the Referee.

The foregoing recitation sets forth a portion of the overwhelming corroborative evidence adduced by respondent in support of the charge. The testimony of the complainant, that she knew nothing of the Hitchcock settlement until the December 1966 confrontation with petitioner, that she did not authorize such a settlement, that the petition seeking approval of the settlement by the Surrogate's Court did not bear her genuine signatures and that she never authorized petitioner to use any of her funds or her children's funds, has not even been referred to.

The petition (pp. 6-7) seeks to impeach the complainant's credibility, alleging that she had undergone shock therapy designed to dull her memory. That allegation is true insofar as it goes. The petition, however, fails to disclose a) that the shock therapy referred to was confined to a period in January 1963, in order to relieve the complainant's mind of the painful memory of the trauma associated with the death of her husband; and b) that the events involving the unauthorized settlement of the Hitchcock claim, which were the subject of the charge, did not begin until the summer of 1965 and could hardly have been affected by shock therapy administered some two and a half years earlier.

Inasmuch as the purpose of this statement of facts is to demonstrate the overwhelming affirmative evidence adduced in support of the charge, reference to the incredible inconsistencies in petitioner's testimony upon which the Referee also relied is intentionally omitted.

ARGUMENT

I.

A Disciplinary Proceeding Is Not a Criminal Case Within the Meaning of the Constitution and Does Not Require Proof Beyond a Reasonable Doubt.

The principal thrust of the petition is two-pronged. On the one hand, petitioner asserts, erroneously as our statement of facts clearly demonstrates, that he was disbarred without any significant affirmative evidence in support of the charge. On the other hand, relying principally on *Matter of Winship,* 397 U.S. 358 (1970), petitioner argues that proof of the charge in a disciplinary proceeding should be required beyond a reasonable doubt, the standard applicable in criminal cases.

Petitioner's reliance upon *Winship* is totally misplaced. For, as that decision itself is careful to note, the fact situation there considered involved charges of violation of the criminal law which, if established, would subject the delinquent to the loss of his liberty for up to six years, 397 U.S. at 365, 367, 368.

In contrast, a disciplinary proceeding does not involve charges of violation of the criminal law but rather charges of professional misconduct and can under no circumstances result in the loss of liberty of the individual against whom charges are brought. Thus, the very considerations which in *Winship* resulted in this Court holding that proof beyond a reasonable doubt was required are totally absent. The very reasoning of *Winship* leads to the conclusion,

therefore, that the burden of proof beyond a reasonable doubt is not applicable to a disciplinary proceeding.

This result is perfectly consistent with the distinction between a disciplinary proceeding, a standard criminal prosecution and the juvenile proceedings considered in *Winship*. The standard criminal prosecution or juvenile proceeding, as we have already noted, seeks to deprive the accused of his liberty. A disciplinary proceeding is, in essence, nothing more than a licensing hearing in which facts surrounding the conduct of the person accused are examined to determine whether he is entitled to a continuation of the license which, in the case of an attorney, grants him an absolute monopoly to provide access to the lay public to the administration of justice and to exercise the awesome powers attendant thereto.

The license to practice law constitutes a certification to the public that the holder has been examined with respect to both character and learning and has been found to be reliable. Clients must rely upon this certification, for they have no means whereby they can make this determination by themselves. When that certification and the holder's entitlement thereto is called into question, a disciplinary proceeding is the means by which the continued fitness of the holder is determined.

The essentially civil nature of this licensing procedure has long been established, *Ex Parte Wall*, 107 U.S. 265, 288 (1882). To hold, as petitioner contends, that a disciplinary proceeding is in essence a criminal case and requires proof beyond a reasonable doubt, would require the courts to continue to certify to the public, and to require the public as a practical matter to continue to rely upon, attorneys whose conduct has been called into question and against

whom the weight of the evidence demonstrates that there is no justification for such continued certification or reliance. In an era when confidence in the instrumentalities of the administration of justice in general and the integrity of the Bar in particular are more and more called into question such a radical lowering of standards would be intolerable. Moreover, such a holding would inevitably similarly affect any license revocation proceeding, whether it involved an attorney, a barber or a licensed retailer.

To hold that a disciplinary proceeding is a criminal case would lead to further undesirable ramifications. Attorneys who are the subject of complaints could refuse to respond to questions the answers to which might simply subject them to discipline and did not involve criminal conduct in the usual sense. The right of the courts to police their own officers might be totally undermined, because of the requirement of trial by jury in criminal cases.

The Rules of this Court concerning the discipline of its own Bar graphically demonstrates that such result was never contemplated. Thus, where it is shown to this Court that any member of its Bar has been guilty of misconduct, he is forthwith suspended from practice and thereupon offered the opportunity to show good cause why he should not be disbarred (Revised Rule 8). Contrary to the procedure applicable in criminal cases, the "accused" is thereby required to come forward to explain his conduct.

The entire issue of the burden of proof is, moreover, irrelevant here. Even if it is assumed, *arguendo,* that the criminal standard of burden of proof should be applied, the evidence summarized in the statement of the case,

supra, clearly raised issues properly submitted to the fact finder for determination. That evidence, together with the repeated demonstrations in the course of the hearing that petitioner, the only factual witness called in support of his defense, gave false testimony on material points would have warranted the Referee's conclusions that the charge had been established in any forum under any standard of proof.

II.

The Discipline of Disbarment Was Fully Warranted and Was Not Discriminatory.

As the petition and cases cited therein note, the Appellate Division's discretion in the imposition of discipline is significantly guided by the persistence of misconduct, the voluntary nature of restitution if made, the evidence of intent to defraud and the indication, or lack of it, of contrition. It is difficult to conceive a case in which these factors more clearly call for disbarment.

It is conceded that petitioner converted at least $6,500 of the client funds. Only a portion thereof was the complainant's personal property. The balance represented monies held by her in trust for her two infant children pursuant to order of the Surrogate's Court. The conversion began in 1963. It continued until 1968, even after the client, in December 1966, accused petitioner of settling a claim without her knowledge or consent.

The major portion of the sum converted was repaid on December 14, 1966, not voluntarily, but only as a result of a confrontation insisted upon by complainant to which

she felt compelled to bring another attorney retained for that purpose.

The evidence of petitioner's intent to defraud permeates the record. His improper request to counsel for the defendant in the underlying Hitchcock matter to settle without an order of the Surrogate's Court; the forgery of the client's signature to a petition seeking court approval of the settlement; the certification of a falsely conformed copy of the Surrogate's Court order approving the settlement; and the endorsement and conversion of the settlement checks; conclusively demonstrate the intentional nature of petitioner's conduct. It should be noted, incidentally, that the deliberate distortion of the order authorizing the settlement does not appear in the charge because it was discovered after charges had already been made and an amendment at that stage might have raised constitutional issues, *In Re Ruffalo,* 390 U.S. 544 (1968). The evidence was, of course, nevertheless relevant to the charge of settlement of the claim without the client's knowledge or consent.

The record is devoid of any evidence of contrition. In fact, the charge of forgery and settlement without the client's knowledge or consent was denied and petitioner, as the Referee found, repeatedly gave false testimony to support that denial. The conversion of client funds continued from 1963 to 1968, even though petitioner contended that following the December 1966 confrontation he opened a special account to segregate client funds from his own.

In these circumstances, we respectfully submit, there exists a total lack of mitigating circumstances similar to those considered in the cases cited in the petition warranting lesser discipline.

CONCLUSION

The Petition for a Writ of Certiorari Should Be Denied.

Respectfully submitted,

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